Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Verizon Petition for	)	WC Docket No. 01-338
Forbearance under Section 10(c)	)	
of the Communications Act	)	

MOTION TO DISMISS AND OPPOSITION OF COVAD COMMUNICATIONS COMPANY

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Introduction

Covad Communications Company (Covad), by its attorneys, hereby respectfully submits its motion to dismiss and opposition to Verizon's petition for forbearance under Section 10(c) of the Communications Act, as amended. Verizon asks the Commission to forbear from applying items four through six and ten of the section 271 competitive checklist should the Commission determine that the corresponding elements no longer need to be unbundled under section 251(d)(2). For the reasons explained below, Covad submits that Verizon's petition is unripe, seeking speculative relief under circumstances which are, according to the terms of Verizon's petition itself, at this point purely hypothetical. Furthermore, Covad submits that Verizon has failed to demonstrate that the market-opening conditions of section 10(d) of the Act have actually been met, a necessary prerequisite for its petition to be granted. Accordingly, Covad moves that Verizon's petition for forbearance be dismissed.

Discussion

There is no argument that, prior to granting Verizon the forbearance relief it requests, the Commission must first determine that section 271 of the Act has been "fully implemented."[1] Under the very terms of Verizon's petition, the relief Verizon seeks is purely speculative. According to Verizon's petition, forbearance from applying checklist items four through six and ten of the section 271 checklist (local loop, transport, switching and signaling/routing databases) is warranted when the Commission determines that the "corresponding" UNE (by which Verizon presumably means UNE

[1] Section 10(d) of the Act provides that "the Commission may not forbear from applying the requirements of section 251(c) or 271 under subsection (a) of this section until it determines that those requirements have been fully implemented." 47 U.S.C. § 160.

switching, dedicated transport, high-capacity loops, and signaling)[2] no longer meets the impairment test under section 251(d)(2). As must surely be obvious to Verizon, the Commission has not actually made any such determination that these UNEs no longer meet the impairment standard set forth in section 251(d)(2). Nor, indeed, does Verizon's petition ask the Commission to make such a determination. Until the Commission actually makes any such determination, Verizon's petition is unripe. Accordingly, the Commission should immediately dismiss Verizon's petition.[3]

Indeed, at this juncture, Verizon's petition represents an extraordinary waste of time and resources both for this Commission and for interested parties. Verizon's petition forces the Commission and commenting parties to go through the tortuous exercise of determining whether the standards of section 10(a) and 10(d) of the Act would be met, if the Commission were to someday determine that some of the network elements currently required to be unbundled no longer meet the test for impairment under section 251(d)(2). Yet, if the Commission does not make any such determination, and ultimately decides instead to maintain the current list of UNEs, this Commission's and interested parties' efforts to resolve Verizon's forbearance petition will have been wasted. Until such time as the Commission decides that a network element no longer meets the standard set forth in section 251(d)(2), the relief Verizon seeks here is purely speculative and hypothetical.

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[2] *See* Verizon Petition at 3-4.

[3] Although administrative agencies are not bound by the same standards of ripeness as Article III courts, this Commission has previously looked to Article III ripeness standards for guidance in using its discretionary powers under the Act. For example, as the Commission stated in denying a petition for declaratory ruling, "concepts of ripeness can also provide a useful analogy in determining whether the Commission should exercise its discretion to issue declaratory rulings." *In The Matter Of Omnipoint Communications, Inc. New York Mta Frequency Block A*, Memorandum Opinion and Order, File No. 15002-CW-L-94, FCC 96-340, 11 FCC Rcd. 10785 (1996).

It simply makes no sense for the Commission and for parties to engage in the detailed, fact-specific inquiries required by section 10(a) and 10(d) at this premature juncture. At this point, there is simply nothing for the Commission to forbear from, because the Commission has not made any determination that the UNEs at issue in Verizon's petition no longer meet the impairment test in section 251(d)(2). Verizon's petition for forbearance, at present, is simply an extraordinary waste of everyone's time. The Commission should immediately dismiss Verizon's petition, and save itself and the industry from the wasteful exercise for which Verizon's petition calls.

Although Verizon's petition is unripe and should be immediately dismissed for the reasons already discussed, Covad adds that Verizon's petition fails to meet the clear requirements of section 10(d) of the Act. Under that provision, forbearance from section 271 of the Act may not be granted until the requirements of Section 271 have been "fully implemented."[4] In only one paragraph of its petition does Verizon actually purport to address this requirement,[5] stating that this condition is met once a BOC receives section 271 authority in a state. Verizon then goes on to argue that the requirement of section 10(d) (that section 271 be fully implemented) is also met when the Commission determines that a network element no longer meets the section 251(d)(2) impairment standard. Both propositions fly in the face of reason. Indeed, Verizon must have given them such short shrift precisely because they are unsupportable.

According to Verizon's first proposition, forbearance from section 271 would be appropriate whenever a BOC received section 271 authority in a state. By that logic, as

[4] *See* 47 U.S.C. § 160(d).

[5] *See* Verizon petition at 7.

soon as a BOC met the market-opening conditions of section 271, section 10(d) would allow the Commission to let the BOC backslide on its section 271 compliance. Thus, according to Verizon's view of the world, in order to enter interLATA markets, a BOC would simply have to demonstrate its compliance with the checklist provisions of section 271 for one brief, shining moment. The Commission's actual conduct of section 271 reviews and its post-entry enforcement certainly belie Verizon's view of the statute. Indeed, the statutory scheme upon which BOC long distance entry is premised requires the BOC to be facilitating competitive entry by providing, among other things, the unbundled network elements delineated in the competitive checklist. It is therefore impossible to credit Verizon's argument that, once it enters the long distance market in a state by proving that competition is viable through the UNE-based entry scheme contemplated by Congress, the BOC is free to simply end that mode of entry by barring competitors from using the same UNEs upon which entry into the long distance market was conditioned.

Verizon's second proposition is merely a rehash of its circular argument that removing a network element from the list of mandatory UNEs that ILECs must provide under section 251(c)(3) also eliminates a BOC's requirement to show checklist compliance with a similar checklist item under section 271. Of course, Verizon fails to explain why Congress would have drafted two entirely separate sections of the statute, applying to two different categories of entities (ILECs and BOCs), if it meant the obligations in both to be identical. This statutory construction particularly lacks sense given that two of the section 271 checklist items incorporate by specific reference the

obligations in section 251(c).[6] Contrary to Verizon's argument, it is clear that, although Congress intended to impose a requirement on the BOCs to comply with all of the provisions of section 251(c)(3) prior to entering the long distance market, Congress recognized that a more stringent requirement on post-271 entrants was needed. Therefore, Congress imposed an *additional* obligation on BOCs to comply with the market-opening provisions of the section 271 competitive checklist in order to enter – and stay – in the long distance market in a particular state. Congress recognized that permitting the BOCs to enter the long distance market would result in severe anticompetitive behavior in the absence of an open local telecommunications market, and the competitive checklist is a reflection of Congress' clear intent that no BOC be permitted to offer long distance services unless it maintains it compliance with every term of the competitive checklist – including the UNE provisions. Although the Commission may forbear from section 271, pursuant to section 10 of the Act, after the Commission determines that the statutory provision has been "fully implemented," the Commission has not so found, Verizon does not now ask it to so find, and thus the instant Verizon petition is unripe and should be dismissed.

Verizon's interpretation of its section 271 checklist obligations notwithstanding, Verizon fails to explain what any of this has to do with the requirement of section 10(d) that section 271 be "fully implemented" before the Commission can forbear from it. The argument in Verizon's second proposition pertains to merely whether a particular requirement is or is not part of the section 271 checklist – not whether section 271 has been "fully implemented" as required under section 10(d). While Verizon's argument

[6] *See* 47 U.S.C. § 271(c)(2)(B)(i - ii).

may have relevance to how the Commission conducts its review of future 271 applications, it has no bearing on whether the Commission is statutorily permitted to entertain a petition for forbearance from section 271. Verizon has simply made no showing that section 271 has been fully implemented as called for by section 10(d). Thus, Verizon fails to meet one of the essential prerequisites for the Commission's entertainment of its forbearance petition.

Finally, Verizon fails to explain in its petition how the Commission can grant Verizon the relief it seeks and comply with section 10(e) of the Act, which attaches state preemption to any Commission forbearance action pursuant to section 10. If the Commission were to forbear from section 271 of the Act, as Verizon requests, the Commission would necessarily preempt any and all state action pursuant to section 271, including the state post-entry performance plans upon which all section 271 grants have been conditioned. Section 10(e) of the Act provides that "[a] State commission may not continue to apply or enforce any provision of this Act that the Commission has determined to forbear from applying under subsection (a)" of section 10.[7] All state performance assurance plans, post-long distance entry enforcement provisions, and any similar such state action taken in order to protect consumers and competitors would be preempted if the Commission were to grant Verizon's petition. Because the Commission has not yet undertaken an inquiry into preemption of state post-271 entry mechanisms, Verizon's petition for forbearance is premature and must be dismissed.

[7] 47 U.S.C. § 161.

Conclusion

Accordingly, because Verizon's petition is unripe and fails to meet the requirements of section 10 of the Act, it should be immediately dismissed.

Respectfully submitted,

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